STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2003
v	No. 240010 Wayne Circuit Court
COURTNEY J. GRIMES, Defendant-Appellant.	LC No. 01-007464

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529.[1] Defendant was sentenced to ten to twenty years' imprisonment for the armed robbery conviction. We reverse and remand for a new trial.

Defendant, Kevin Grimes, and two other individuals showed up at Jason Simms' home demanding money. According to Simms, following a discussion over money, defendant retrieved a gun from a car and returned demanding money. Simms testified that he gave the men $310, and at that point the four individuals split up the money and left. Simms also testified that, once defendant was arrested and charged in connection with this incident, Simms was approached by Kevin Grimes who grabbed him by the throat, and cut his throat, with a knife, while stating, "This is for Smack."[2]

Defendant's first issue on appeal is that he was denied a fair trial when prejudicial bad acts testimony was improperly admitted and when the trial court refused to give a cautionary instruction with regard to this testimony. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662

[1] Defendant's case was consolidated with that of his cousin and co-defendant, Kevin Grimes, who was also charged with and convicted of armed robbery. Defendant was also charged with possession of a firearm in commission of a felony [hereinafter "felony-firearm"], but was found not guilty on this count.

[2] Defendant is also known as "Smack" or "Sugar Smack."

NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion, *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). A preliminary issue of law regarding admissibility based upon construction of a constitutional provision, rule of evidence, court rule, or statute is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a), *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Defendant argues that the trial court abused its discretion in admitting evidence of a statement Kevin Grimes made to Simms. Simms testified that, following a preliminary examination hearing for defendant, with regard to the armed robbery charge, Kevin Grimes approached him as he was leaving a store, grabbed him around the neck, started to cut his throat, and said "This is for Smack." The prosecution filed a motion for admission of similar act evidence in this case. In an initial proceeding, Judge Michael Hathaway held that the act by Kevin Grimes would be admissible at trial, but reserved his ruling with regard to the alleged statement "This is for Smack." Subsequently, this case was transferred to Judge Leonard Townsend who determined that the statement was admissible as it was not an accusation against defendant and was not prejudicial to defendant.

The issue of whether the act of Kevin Grimes, allegedly, grabbing Simms by the neck and cutting his throat was admissible is not properly preserved. Failure to provide a transcript of the relevant proceedings can preclude appellate review. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). Defendant has failed to provide this Court with the transcript of the proceeding in which Judge Hathaway ruled that the act was admissible, and thus, appellate review is precluded on this issue.

With regard to the statement "This is for Smack," defendant contends that the statement should have been excluded under MRE 404, which prohibits the introduction of evidence of a person's character to prove that he or she acted in conformity with that character.[3] Defendant's argument is without merit, since MRE 404 applies only to prior *acts*, not to prior *statements.*

[3] Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *VanderVliet*, *supra* at 65. By its own terms, MRE 404(b) is applicable to any "person," and thus, is not limited to evidence concerning only a defendant. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

People v Goddard, 429 Mich 505, 518; 418 NW2d 881 (1988); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989) (emphasis added). Thus, MRE 404(b) is inapplicable because "[a] statement of general intent is not a prior act for purposes of MRE 404(b)." *Goddard, supra* at 514-515. Rather, co-defendant Kevin Grime's threat was a statement of a party-opponent pursuant to MRE 801(d)(2) and "admissibility is determined by the statement's relevancy and by whether its probative value is outweighed by its possible prejudicial effect." *People v Milton*, 186 Mich App 574, 576; 465 NW2d 371 (1990), citing *Goddard, supra* at 514-515; see also *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Further, an out-of-court statement by a co-defendant, admissible under the rules of evidence, can be used to inculpate a non-declarant defendant when it does not violate defendant's right of confrontation. *People v Poole*, 444 Mich 151, 162-164; 506 NW2d 505 (1993); see also *People v Schutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000). Here, the declarant, co-defendant Kevin Grimes, testified as did the victim, Simms, and thus, there is no violation of defendant's right of confrontation. Therefore, the only inquiry is whether the statement was relevant and whether its probative value is outweighed by its possible prejudicial effect. *Rushlow, supra* at 176; MRE 403.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence of co-defendant Kevin Grimes' harming Simms is relevant in a criminal trial. See *People v Amos*, 453 Mich 885; 552 NW2d 917 (1996). Because Simms' allegations represented the primary evidence against defendant and Kevin Grimes, his credibility was certainly material to the instant case. Additionally, the evidence regarding Kevin Grimes' statement to Simms tended to establish that co-defendant Kevin Grimes attempted to coerce Simms. Though the evidence is not highly relevant with regard to defendant, it does tend to establish that Kevin Grimes was coercing Simms with regard to the pending criminal matter. Therefore, the evidence was relevant because it tends to establish that there was coercion and it goes to Simms' credibility, a fact in issue. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998). Moreover, co-defendant Kevin Grimes testified and had the opportunity to refute the statement. As such, defendant also had an opportunity to examine Kevin Grimes.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin (After Remand), supra* at 58. The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Given that the statement in question was relevant to the prosecutor's theory of the case, and given that the jury received evidence that could have counteracted the effect of the statements, the trial court did not abuse its discretion in ruling that the statements were not substantially more prejudicial than probative, even if testimony may have prejudiced defendant to some degree. MRE 403. The evidence really was not prejudicial at all with regard to defendant, and was very insignificant. As such, we find that the probative value of Kevin Grimes' statement was not substantially outweighed by any danger of unfair prejudice, as the evidence did not have a significant prejudicial effect on defendant. MRE 403. The evidence did not have "an undue tendency to move the tribunal to decide on an improper basis" the issues before it. *People v Lasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Furthermore, even if the issue was close, a decision on a close evidentiary question

ordinarily cannot be an abuse of discretion. *Sabin (After Remand)*, *supra* at 67. Therefore, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Defendant also argues that the trial court erred in denying defendant's request for a special instruction regarding similar acts evidence. However, as noted, *supra*, this is not a subsequent bad act of defendant or similar act of defendant, but rather a bad act of Kevin Grimes, and was only a statement that referred to defendant. See *Goddard, supra* at 518; *Rushlow, supra* at 176. Defense counsel requested a "Similar Acts Instruction" stating that the "evidence was only introduced to show identification, scheme, [or] pattern." The prior act was admissible for purposes other than as a subsequent bad act of co-defendant Kevin Grimes. It is a longstanding rule in Michigan that evidence of a defendant's attempt to suppress testimony or induce perjury is directly admissible as evidence of consciousness of guilt even though it may also be consistent with innocence. See, e.g., *People v Salisbury*, 134 Mich 537, 569; 96 NW 936 (1903); *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981); *People v Ranes*, 58 Mich App 268, 272; 227 NW2d 312 (1975); *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973). This was not evidence that was introduced to show identification, scheme, pattern, or to show the criminal propensity of defendant, but was direct evidence of co-defendant Kevin Grimes' consciousness of guilt. Thus, the trial court did not err in failing to give the jury a "Similar Acts Instruction," with regard to defendant.

Defendant's second issue on appeal is that he was denied a fair trial because his right to confront his accuser was violated when the trial court limited cross-examination. We disagree. The constitutional right for a defendant to confront his accusers is reviewed de novo. See, generally, *Lilly v Virginia*, 527 US 116, 118; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *People v Smith*, 243 Mich App 657, 681; 625 NW2d 46 (2000).

"The scope of cross-examination is within the discretion of the trial court." *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "Neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *Cantor, supra* at 564. Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id.* While the trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). "The Sixth Amendment right of confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993).

Defendant contends that the trial court infringed on his right to confront the witnesses against him. We find that defendant was not denied his right of confrontation or cross-examination. Defense counsel asked Simms if he was using cocaine on the day in question, and the trial court stated "don't answer the question. It has nothing to do with this matter." Defense counsel asked Mary Stoudmire if she owed anyone money for drugs, and she, apparently,

responded "no."[4] Defense counsel then went on to ask if Stoudmire was "using drugs at that time." Upon objection, the trial court stated that the question "has nothing to do with credibility. It [sic] for defamation of a witness, and I'm not going to allow it." Clearly, this line of cross-examination was relevant based upon the defense that Simms and Stoudmire were drug customers and that defendant and Kevin Grimes were collecting a drug debt from Simms at the time of the alleged robbery. However, this defense was not raised until Kevin Grimes testified, which was subsequent to the cross-examination of Simms and Stoudmire. There was no evidence of a drug deal between Simms and defendant or Kevin Grimes until Kevin Grimes testified. Prior to Kevin Grimes' testimony drug use by Simms and Stoudmire was only marginally relevant to their credibility. For this reason, the trial court did not abuse its discretion in limiting the cross-examination of Simms and Stoudmire with regard to drug use. *Cantor, supra* at 564.[5]

Defendant's third issue on appeal is that the trial court committed reversible error by refusing to instruct the jury on requested necessarily included offenses of armed robbery where there was a substantial question as to the existence of a weapon and the jury, in fact, acquitted defendant of felony-firearm. We agree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

Defendant argues that the trial court erred in refusing to instruct the jury on larceny from the person and unarmed robbery. A requested instruction on a necessarily included lesser offense, whether a felony or a misdemeanor, is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support it. *People v Reese (Reese II)*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A necessarily included offense is one which must be committed as part of the greater offense, and it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *People v Reese (Reese I)*, 242 Mich App 626, 629-630; 619 NW2d 708 (2000), aff'd 466 Mich 440; 647 NW2d 498 (2002). If a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Alter*, 255 Mich App 194, 199; 659 NW2d 657 (2003). To be supported by a rational view of the evidence, the evidence must justify a lesser included offense, and proof on an element differentiating the two crimes must be in dispute sufficiently to allow the jury to consistently find the defendant not guilty of the charged offense but guilty of the lesser offense. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grounds in *Cornell, supra*. Thus, if either party requests an instruction regarding a necessarily included offense that is supported by the evidence, the court must instruct the jury on the lesser offense.

[4] The record is unclear, but suggests Stoudmire's response to this question was no.

[5] Even if we had concluded that the trial court abused its discretion by limiting cross-examination of Simms and Stoudmire, the error was harmless beyond a reasonable doubt, as Kevin Grimes testimony adequately presented defendant's version of the facts. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

Reese II, supra at 446-477; *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997).

Defendant requested that the jury be instructed on the lesser offenses of unarmed robbery and larceny from the person. With regard to unarmed robbery, "[u]narmed robbery is a necessarily included lesser offense of armed robbery, with the distinguishing element being the use of a weapon or an article used as a weapon." *Reese I, supra* at 630; *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). Evidence that establishes the greater offense of armed robbery always supports the lesser offense of unarmed robbery. *People v Allen*, 80 Mich App 786, 788; 265 NW2d 47 (1978). Consequently, the trial court was required to give the requested instruction for unarmed robbery, if the evidence supported the instruction. *Reese II, supra* at 446-447; *Garrett, supra* at 652.

With regard to larceny from the person, larceny from the person is a necessarily included offense within armed robbery because larceny from the person includes no additional elements, and differs only by its absence of the element of a weapon or an article used as a weapon, violence or intimidation. *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds, *Cornell, supra* at 357-358. "Robbery is committed only when there is larceny from the person . . . . Every robbery would necessarily include larceny from the person and every armed robbery would necessarily include both unarmed robbery and larceny from the person as lesser included offenses." *Chamblis*, *supra* at 425. Therefore, the trial court erred in failing to give the larceny from the person instruction to the jury if the evidence supported the instruction. See *Reese II, supra* at 446-447.

Applying these precedents here, we conclude that the trial court erred, in the present case, by failing to instruct the jury with respect to the necessarily included lesser offenses of unarmed robbery and larceny, both of which were clearly supported by the evidence. There was testimony from Kevin Grimes that he did not see anyone with a gun and that no one threatened Simms with harm, and thus, there was evidence to support the instructions for larceny from the person and unarmed robbery. Further, there was testimony from Kathy Diggs, defendant's girlfriend, that defendant never went on the porch where Simms was standing, and that by the time defendant reached the porch he turned around to come back to the car because Simms had already given the other individuals money. The trial court was obligated to give the unarmed robbery instruction and larceny from the person instruction to the jury, as requested, because unarmed robbery and larceny from the person are necessarily included lesser offenses of armed robbery that were supported by evidence. *Reese II, supra* at 446-447; *Chamblis*, *supra* at 425; *Garrett*, *supra* at 651-652.

The failure to instruct on a lesser included offenses can be harmless error. *Cornell, supra* at 361. The validity of the verdict is presumed, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice, in that, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). An error was outcome determinative if it undermined the reliability of the verdict, and the defendant has the burden to show that it is more probable than not that the reliability of the verdict was undermined, considering the nature of the error in light of the weight and strength of the untainted evidence. *Cornell, supra* at 363-364; *Rodriguez*, *supra* at 474. The reliability of a verdict is undermined if, considering the entire cause, a lesser included offense instruction which

was supported by substantial evidence was not given. *Cornell, supra* at 365. Conversely, the failure to give the lesser included offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Cornell, supra* at 365. If sufficient indications of a jury compromise are present, reversal can be warranted. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

Defendant has met his burden, in this case, as there is substantial evidence of the lesser offenses that the jury was not instructed on and sufficient indication of a jury compromise is present. Co-defendant Kevin Grimes testified that he did not see anyone with a gun and that no one threatened Simms with harm. Diggs testified that defendant never went on the porch where Simms was standing, and that by the time defendant reached the porch, he turned around to come back to the car because Simms had already given the other individuals money. Accordingly, there was evidence presented to support a finding that defendant did not have a gun and that there was no violence or intimidation during the incident involving Simms. Simms was the only witness to the gun, while other witnesses did not see a gun. An instruction on larceny from the person and unarmed robbery comported with evidence presented by the defense that no gun or threat of harm was involved. The evidence "clearly" supported the requested lesser included instructions. See *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *Cornell supra* at 365. Under the facts of this case, reversal is warranted, as the error is not harmless.

In addition, defendant was acquitted of felony-firearm. Just because the jury acquitted defendant of felony-firearm does not mean that there was a reasonable probability that the jury would have found him guilty of unarmed robbery or larceny from the person rather than armed robbery. We note that the verdict is not technically inconsistent as a felony-firearm conviction, MCL 750.227, requires "possession of a firearm" while armed robbery, MCL 750.229, only requires that the defendant be "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." And the evidence presented was that a firearm is what was used by defendant. Even if the verdict was inconsistent, which it technically is not, it is not unusual for a jury to reach an inconsistent verdict as juries possess the "capacity for leniency" and "are not held to any rules of logic." *People v Goss (After Remand),* 446 Mich 587, 597, 521 NW2d 312 (1994) (Levin, J); *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); see also, *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984). However, when this felony-firearm acquittal is combined with the fact that evidence was presented by the defense that no weapon was used or there was no threat of harm or intimidation, it is more probable than not that the absence of an instruction on larceny from the person and unarmed robbery did affect the outcome. Under the circumstances where there was testimony to contradict that a weapon was used and that there was threat of harm, the use of a weapon and threat of harm was an issue at trial, and defendant was acquitted of felony-firearm indicating a possible jury compromise, we find that the error was not harmless.

The trial court's failure to provide the, clearly supported, requested instructions was not harmless error. *Cornell, supra* at 361. As for the appropriate remedy, "the failure to instruct the jury regarding . . . a necessarily lesser included offense is error requiring reversal, and retrial with a properly instructed jury." *Silver, supra* at 388, citing *Cornell, supra*. Accordingly, we reverse and remand for a new trial with a properly instructed jury. Because we find the

instructional error requires reversal and a new trial, it is unnecessary to address defendant's Sixth Amendment issues.

Reversed and remanded for a new trial with a properly instructed jury. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly